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Case Comment: *Manson v Midlothian Council*

Part 1 of the Land Reform (Scotland) Act 2003 provides an important legal route for public access to private land in Scotland. The legislation, which introduced rights of access to be on or to cross land (subject to limited exceptions relating to the land itself or the conduct of an access taker), has generally been welcomed and, in some quarters, even lauded: for example, in January this year, an event was held at the Scottish Parliament to "*celebrate the 15th anniversary of the passing of the nation's world-class access legislation.*" This reception, organised by Ramblers Scotland, was suitably positive about Scotland's modern access regime, which is only to be expected given the group's ethos and outlook. But it would also be fair to say that the modern access regime has not always had a warm reception in all quarters. In this regard, 2018 brought two further important cases about its application.

The first case – *Renyana Stahl Anstalt v Loch Lomond and the Trossachs National Park Authority* [2018] CSIH 22; 2018 S.L.T. 331 – has been the subject of comment by the author in two earlier articles (Combe, "Revisiting access to land under the Land Reform (Scotland) Act 2003" 2018 S.L.T. (News) 51; "Access to land: responsible landowner conduct under the Land Reform (Scotland) Act 2003" 2017 S.L.T. (News) 201). This was a dispute about land access near Loch Ard in the Trossachs, where a landowner attempted to deny access to a place that was not automatically excluded as a forum for responsible access by the operation of section 1(7) and section 6 of the 2003 Act. Section 6 details which land can never be suitable for access, such as a school or land where crops are growing. Where land is not excluded from the right to roam, the legislation does allow for some land management decisions that restrict access, but only where the purpose of those decisions is not purely or primarily about restricting access. In *Renyana Stahl Anstalt*, the Inner House clarified that the standard by which landowners are to be judged when it comes to assessing their motivations is objective rather than subjective. The second important case in 2018 – *Manson v Midlothian Council* [2018] SC EDIN 50 – is the subject of this article. This provides an interpretation of the earlier *Renyana Stahl Anstalt* case, and explains the proper role of access authorities (i.e. the local authority or, where relevant, the national park authority) in the enforcement process when access has been blocked. It also serves as a useful reminder of the extent of land around a dwelling that can be excluded from responsible access in terms of section 6(1)(b)(iv).

At the time of writing, it seems that there will be an appeal of this sheriff court decision, although no timeframe has been indicated for such an appeal. The following observations are accordingly offered with the caveat that any appeal could unsettle what seem to be settled matters. They are also offered without wishing to prejudge any appeal. All of this notwithstanding, the points raised in the case are interesting and important enough to analyse at this stage, and analysis of the legal points follow after a brief scene-set.

Setting the scene

Manson related to a blockage of a path in Penicuik that was relatively proximate to a house in an area described in the case as suburban and semi-rural. As with many court cases about access rights, a section 14 notice from the relevant access authority was involved. In the scheme of the 2003 Act, access authorities have a duty to uphold access rights (s 13). They can do this in various ways, including serving notice when they consider s 14(1) (which

relates to impediments to access) has been breached by a landowner. In *Manson* (and the earlier case of *Renyana Stahl Anstalt*) matters were brought to court via a s 14(4) "appeal" against a notice.

The pursuers – a married couple who lived in the house in question with their two sons – also sought a declarator in terms of section 28 that their land was excluded from access rights. The exclusion that was argued for was section 6(1)(b)(iv), which excludes certain land around a dwelling to allow for a suitable degree of privacy and a certain amount of undisturbed enjoyment for those in that dwelling. This provision has prompted much litigation already, having been considered in cases such as *Gloag v Perth and Kinross Council* 2007 SCLR 530 and *Creelman v Argyll and Bute Council* 2009 S.L.T. (Sh Ct) 165 and *Forbes v Fife Council* 2009 S.L.T. (Sh Ct) 71. Before Sheriff Fiona Lennox Reith, QC, the pursuers were unsuccessful in this argument, and the access authority's notice was allowed to stand. The notice did however face a novel challenge on human rights grounds, which will need to be borne in mind by access authorities seeking to clear obstructions in the future.

The Mansons' house – a modest, single-storey, family home – is set in roughly 0.21 hectares. A well-defined path runs relatively near this building, and the extent of the land co-owned by the pursuers takes in part of this path. This path tapers off from a road, along which access to the house was taken by the co-owners (and others) for domestic purposes. Whilst (as we shall see) privacy was thought to be a particular issue in this case, it is (apparently) not particularly easy to see into the pursuers' house from the path or the road. The path then leads to Penicuik Estate.

The pursuers took steps to restrict access across their land, installing a fence with a padlocked gate across the path in way that might still allow access to be taken (albeit with the need for the use of a key), whereas those without a key would face an eight feet tall barrier, painted with anti-climb paint, and an array of signs and a placebo CCTV camera. Prior to the pursuers' modifications, there was a both kissing gate and a metal five-bar gate. Evidence was led (which the sheriff accepted) that the kissing gate was not normally locked.

These steps had the effect of making a previously usable route somewhat more tricky to negotiate. Were the landowners entitled to take these steps?

Issue 1: was the land subject to access rights?

If the land had been excluded from responsible access then, at least for the purposes of the 2003 Act, those steps would have been acceptable. The sheriff however held the land was not within the prescribed section 6(1)(b)(iv) exclusion. As noted, this can exempt domestic ground next to a dwelling. Every case like this will turn on its own facts, but the situation here does seem somewhat reminiscent of the earlier *Forbes* case. That case related to a path near some houses in Glenrothes which was on the far side of a fence as compared to the dwellings. In *Manson*, the sheriff noted it was difficult to classify a path that was about 20 metres to the west of the house as "adjacent" (at para.121: I will return to that measurement below). She then went on to note that, assessing the matter objectively, it was difficult to see how a reasonable person could regard the path as being excluded. Objective tests seem to be in vogue for this statutory scheme, and in any event objectivity has something of a track record in relation to this exclusion. This is owing to what Professor John Lovett has termed the "property-specific objective test" where previous court cases have assessed matters

objectively but have teased what they can from the characteristics of a dwelling, in line with section 7(5) of the 2003 Act: “Progressive property in action: the Land Reform (Scotland) Act 2003” (2011) 89 Nebraska Law Review 739 at 791. The situation was somewhat anomalous, not least because of the autism of one of the pursuers’ sons and the related sensitivities that brought, but this did not inform the operation of this particular exclusion.

On a related point, there was also some discussion about the fact that the pursuers (and the father of one of them) had been satisfied with the area of garden ground that had been catered for in the planning permission that was granted for the home in question; a garden area that did not include the path. Tempting as it is to factor that satisfaction into any analysis, it does need to be recalled that an objective test would not necessarily be concerned with the state of mind of a particular individual (or individuals) who submitted a planning application, although an objective analysis of a notional planning applicant might be possible.

Further, and as noted below, the fact that land happens to come into the ownership of someone with particular views or needs — a fact that would not necessarily be publicised on the ground — does not seem to be an apposite criterion for rendering land excluded from access. Any appeal on this ground would have to navigate this and other issues. If there was to be implementation of an approach linked to who happens to be the owner at any time in any appeal, that would require a move away from existing (sheriff) court decisions on section 6(1)(b)(iv), not to mention the wider move towards objectivity in the *Renyana Stahl Anstalt* case. Over and above that, the other point that any appeal would have to contend with is the apparent acceptance of the fact the path was not properly adjacent to the dwelling (but rather being more in the character of the woodland area that did not strictly form part of the garden) (para.121). Incidentally — and coincidentally — the comparator access regime contained in the English and Welsh Countryside and Rights of Way Act 2000 establishes an exclusion area around dwellings situated on land that is classed as accessible under that legislation (Sch 1, para.3). It does this using a fixed distance of 20 metres — the apparent distance from the house to the path in this case. Granted, the Scottish approach does allow for greater adaptation to local circumstances (a point discussed in Combe, *The ScotWays Guide to the Law of Access to Land in Scotland* (2018) at 56-57), and it is not clear from the judgment that the path is exactly 20 metres away (it being variously described as "some 20 metres" or "about 20 metres"), but it seems at least slightly instructive that the English access regime would probably not exclude this path.

Issue 2: in erecting the barrier, what was the purpose of the owners?

As the land was not excluded, the erection of the barrier then fell to be assessed in line with section 14. There is detailed analysis of this point in the case and also much discussion as to whether antisocial behaviour was an issue, raising another analogy with the earlier *Forbes* case, where Sheriff Holligan did allow for the overnight closure of a path. In *Manson*, however, the pursuers sought a “stark”, “all or nothing” approach. The sheriff held that the purpose on main purpose of the barrier was indeed to prevent access, and she made a point of highlighting that the pursuers’ approach had been either ignorant of the right of responsible access that everyone enjoys, or indicated a dim view was taken of responsible access (paragraph 175). The sheriff also clarified that the juridical act of buying land would not change its character for access, a point which was both relevant to the exclusion point discussed above, but also a point that was revealing about the pursuers’ lack of appreciation

of the legislative scheme. On the issue of the behaviour of access takers (with, for example, littering and dog fouling being raised as problems), low-level irresponsible access could not be a reason for stopping all access. All things considered, and even in light of the pursuers' potential garden expansion and apparent issues with their son struggling to sleep as a result of hearing nocturnal access, the land was accessible, the access authority was entitled to take action under section 14(2). All of this seems consonant with the Inner House's decision in Renyana Stahl Anstalt and an appeal relating to this point would face quite a challenge.

Issue 3: did the access authority consider the human rights of the owners?

Manson breaks new ground in its coverage of human rights, owing to a challenge based on Article 8 of and Article 1 of the First Protocol to the European Convention on Human Rights. Part 1 of the 2003 Act has faced earlier human rights tests, notably in *Gloag v Perth and Kinross Council* (also about section 6(1)(b)(iv), but with less focus on the issuing of a section 14 notice) and more recently in *Renyana Stahl Anstalt* (where it was held that the requirement that landowners must manage their land and any historic features in a way that respects access is not a breach of Article 1 of the First Protocol (peaceful enjoyment of property, and a separate challenge based on Article 6 (fair hearing) also failed: Article 6 was also considered in *Forbes*). This case was not a broadside against the scheme of the 2003 Act though. Rather, it was to do with the access authority's approach to its role under the legislation, which (as a public authority) is subject to human rights constraints (and, of course, the 2003 Act itself has to be read and applied in a way that gives effect to Convention rights). The sheriff agreed with Sheriff Fletcher's approach in the *Gloag* case, noting the following of the legislation: "one can see the careful wording of the Act setting out a balanced framework of rights, duties and obligations on all parties involved in the exercise of access rights is itself designed to be Convention-compliant" (paragraph 214). She then proceeded to consider that the pursuers could have "victim status", but she did not agree that the access authority had engaged in a purely "tick-box" exercise with no real engagement with human rights. Accordingly, the section 14 notice stands, with the practical implications for the site in question being that the blockage cannot be left to stand in its present form: subject, that is, to any appeal.

It is submitted that if indeed there is some room for the particular situation of occupiers to be considered, this is a more logical place for it to happen than in relation to an attempt to tailor the application of any exclusions in s.6 (in this situation, the section 6(1)(b)(iv) exception). It could then fall on the relevant access authority and the occupier to work out how to phase in a scheme that is suitable for the occupiers of a given parcel of land, to ensure any "victim" is not railroaded into something which jars against individual Convention rights.

Conclusion

This judgment serves as a useful reminder and application of how the legislation works. Perhaps more importantly it serves notice on access authorities to follow the legislation in a way that does not pitch them against the rights of landowners or others when exercising their statutory role of access champions.

The case itself has (unsurprisingly) attracted favourable coverage from those in favour of a liberal access regime: Ramblers Scotland began 2018 celebrating the modern access regime, and its website is also suitably positive about the "excellent result" in the *Manson* case (see

https://www.ramblers.org.uk/news/news/2018/september/excellent-result-in-lengthy-penicuik-access-dispute.aspx). The Scottish Rights of Way and Access Society (generally known as ScotWays) also welcomed the result (see https://www.scotways.com/news/523-sheriff-court-success-at-cairnbank-road-penicuik).

It is understandable that individual victories in access disputes might be celebrated by interest groups such as these, but, as with much in life, there is a balance that needs to be struck. More extreme reactions from landowners, such as those that might have been evident in recent cases, may not be the norm, but landowners and land managers are also part of society and must have their interests properly considered if Scotland's "world-class" access regime is to have as much buy-in from all parties as possible, including those who might, in certain circumstances, have a fair expectation that some sort of reasonable adjustment should take place to cater for specific needs.

Such a high level discussion is all well and good, but what next for this path in Penicuik? All that can be noted for now is that developments in relation to the appeal are awaited. I hope this note offers as much clarity as is possible in the interim.